

1 JUDGE CHACHKIN: All right. 44?

2 MR. SCHAUBLE: 44, Your Honor. I can understand
3 that this is relevant to an issue that was in existence at
4 the time, to the trunking issue which was in existence at
5 the time of the exhibit exchange, but summary decision has
6 been granted on that, and I am not sure what the relevance
7 of it is at this point in time.

8 JUDGE CHACHKIN: What is the relevance?

9 MR. KELLER: Could I review the exhibit? I think
10 there may be a misunderstanding about what the exhibit is.

11 No, Your Honor, this is not offered for the
12 trunking issue. This is offered for the interference issue.
13 There has been testimony, which we spoke about this morning,
14 that I believe should be stricken, but to the extent that it
15 is not stricken there is testimony that a particular device
16 being operated by Mr. Kay in his Van Nuys office was somehow
17 improper.

18 We intend to offer evidence that that operation
19 was entirely lawful and proper, and we even listed some
20 information on cross-examination of a couple of witnesses
21 that this was standard industry fare available off the
22 shelf.

23 These next three exhibits go directly to that.
24 They demonstrate that the type of device Mr. Kay was
25 operating that was the subject of the inspection in May of

1 1992 is standard equipment.

2 MR. KNOWLES-KELLETT: Your Honor?

3 JUDGE CHACHKIN: Yes?

4 MR. KNOWLES-KELLETT: Could we withhold ruling on
5 this because we may be agreeing with his motion to strike
6 that testimony after consulting with CIB. I cannot make the
7 forfeiture proceeding go away, but I can make this go away.

8 JUDGE CHACHKIN: Apparently there were --

9 MR. KNOWLES-KELLETT: This has no --

10 JUDGE CHACHKIN: No, no, no. Apparently there
11 also has been testimony by your witnesses concerning this
12 equipment, I believe.

13 MR. KNOWLES-KELLETT: My understanding of his
14 motion to strike is that we would be striking any testimony
15 with respect to the cross band repeater.

16 JUDGE CHACHKIN: All right.

17 MR. KNOWLES-KELLETT: We may be agreeing with that
18 motion.

19 MR. KELLER: I would say that you could still
20 admit these, and then if you do strike that testimony you
21 can strike these along with it.

22 MR. KNOWLES-KELLETT: That is fine.

23 JUDGE CHACHKIN: All right. 44 and 45 are
24 received.

25 //

1 (The documents referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit Nos. 44 and 45, were
5 received in evidence.)

6 JUDGE CHACHKIN: What is 46?

7 MR. KELLER: I will address 46. I understand you
8 may have an objection as to the sponsoring witness.

9 Let me say this. The last two pages of 46 are an
10 FCC letter, which should be self-authenticating. I would
11 ask that the preceding pages be admitted along with it for
12 the sole purpose of providing edification of background so
13 that the letter from the FCC can be understood.

14 In other words, the first pages of the document,
15 Your Honor, were a request by Rayfield, actually the
16 manufacturer of these devices, requesting a declaratory or
17 an advisory ruling from the Commission. The last two pages
18 are the Commission's response.

19 The last two pages should self-authenticate or at
20 least give official notice or come in under those regards.
21 The preceding pages are necessary just to place the letter
22 in proper context.

23 JUDGE CHACHKIN: All right. Any objection?

24 MR. SCHAUBLE: Your Honor, for that limited
25 purpose, we have no objection.

1 JUDGE CHACHKIN: All right. 46 is received.

2 (The document referred to,
3 having been previously marked
4 for identification as Kay
5 Exhibit No. 46, was received
6 in evidence.)

7 JUDGE CHACHKIN: 47?

8 MR. SCHAUBLE: Your Honor, we do have an objection
9 here. Probably for purposes of this exhibit, it needs to be
10 split into two parts.

11 The first part of this exhibit, and there are not
12 page numbers here so I cannot --

13 JUDGE CHACHKIN: Yes, there are. The page numbers
14 are on the top.

15 MR. SHAINIS: At the top.

16 MR. SCHAUBLE: Not on ours.

17 MR. KELLER: That might have been the first. Did
18 we do two copies?

19 MR. SCHAUBLE: Everything else has them.

20 MR. KELLER: Well, we will get with you.

21 MR. KNOWLES-KELLETT: Can we work from your copy
22 for just a second?

23 MR. KELLER: Sure. Here. I probably have a copy
24 with me. This is number what?

25 MR. SCHAUBLE: It is Exhibit 47.

1 MR. KNOWLES-KELLETT: 47.

2 JUDGE CHACHKIN: 47. Your copy is not paginated?

3 MR. SCHAUBLE: No, Your Honor.

4 JUDGE CHACHKIN: We can go off the record and can
5 paginate it.

6 MR. KELLER: Here we go. I have it.

7 (Whereupon, a short recess was taken.)

8 MR. SCHAUBLE: Your Honor, the first 52 pages of
9 the exhibit appear to be a series of letters, certificates,
10 et al. It appears to be letters of thanks, appreciation,
11 which appear to show that Mr. Kay has been involved in
12 community service and charitable activities.

13 Your Honor, I would object to this. This is not
14 relevant to the sort of character inquiry that the
15 Commission is interested in. The Commission's character
16 policy statement is that the type of character the
17 Commission is interested in is whether the licensee has the
18 capacity to be truthful to the Commission and the
19 reliability needed in order to comply with the Commission's
20 rules, not whether the person is, to use a phrase, a good
21 guy or a bad guy.

22 I think the Commission, in its character policy
23 statement, made clear that it was not interested in the
24 question of the moral fiber, per se, of the person, but what
25 is relevant is their capacity to be truthful to the

1 Commission and whether they have the reliability to comply
2 with the Commission's rules.

3 I do not think this evidence in the first 52 pages
4 of this exhibit falls within any of the designated issues
5 and is, therefore, irrelevant to this proceeding.

6 JUDGE CHACHKIN: Mr. Keller?

7 MR. KELLER: Yes. Your Honor, first of all, let
8 me put the Bureau's mind at ease. We would love the
9 opportunity to demonstrate to you the high moral fiber of
10 Mr. Kay. That is not the purpose for which these documents
11 are being offered.

12 They are being offered as relevant to the loading
13 issue. Although the documents in the first 52 pages, as Mr.
14 Schauble correctly states, appear at first glance to be and
15 they are in fact a different category than the remaining
16 documents, they are still being offered for essentially the
17 same purpose.

18 Through the testimony of Mr. Kay and indeed some
19 places extrinsically within the document or intrinsic to the
20 document itself, these various awards and expressions of
21 appreciations, etc., by and large go to appreciation for
22 charitable contributions actually in the form of radios and
23 radio service.

24 I would refer just as one example, for example, to
25 page 22, which is within that 52 page range. You will see

1 there that there is a reference to eight standard UHF
2 repeaters and one charger. Also, page 24, the use of
3 two-way radios for guide dogs, etc. Page 25 is similar.

4 The point is and to the extent that the document
5 does not intrinsically so state, Mr. Kay's testimony will
6 certainly tie this together.

7 Now, the latter part of the document is actual
8 documentation. The problem with the situation that we have
9 is this loading issue allegation. For reasons that you have
10 already heard testimony about, Mr. Kay is unable in cases of
11 actual charge for repeater service to historically
12 reconstruct his loading. He always has been. Beyond that,
13 there are many types of loading and use of facilities that
14 are not reflected even in the current billing records he
15 has.

16 For those reasons, for reasons of no official,
17 informal record keeping practices in certain instances, the
18 historical time, loss of documents, there is no way we can
19 go back and historically reconstruct loading, but there has
20 been much testimony by Mr. Kay that a significant use of his
21 system was made by free radios, some of them given loaners
22 and demos. Many of these so-called loaners and demos were
23 for charitable purposes.

24 These documents are being offered and will be
25 offered in conjunction with the testimony of Mr. Kay simply

1 by way of corroborating that to the extent that we can. We
2 wish that we had the ability to go back and reconstruct this
3 historically so we could, you know, nail it shut.

4 The best we can do is offer what corroboration we
5 have to support the testimony of Mr. Kay. That is what this
6 is being offered for. If there are a few documents in here
7 that do not meet that, then they can certainly address them
8 on cross and move to strike those one or two pages.

9 MR. SCHAUBLE: Your Honor, with respect to the
10 documents on pages 53 through 118, which are the rental
11 agreements, while we can have a dispute as to the weight
12 these documents go to, I think he has probably technically
13 met the test for relevance.

14 With respect to these initial documents, I do not
15 see anything. I do not see any sort of findings, you know.
16 There is no indication of what band, what frequency, how
17 many units were operated. A lot of these, you know, there
18 is nothing which even indicates specifically what they were
19 with respect to for donation of radios.

20 MR. KELLER: I admit that, Your Honor. That is
21 what I am saying. It is just being offered for
22 corroboration. We could go back and earmark them
23 specifically, but the documents were not kept and maintained
24 for that purpose.

25 I am sure if we put Mr. Kay on the stand and

1 simply say oh, yes, in addition to this I had a lot of
2 loading because I gave away a lot of radios and a lot of
3 service for charity, we would be reading in our proposed
4 findings that that was just self-serving testimony.

5 I am offering what we have to offer in the way of
6 some corroboration to anticipate that attack, if you will.

7 JUDGE CHACHKIN: All right. I will receive 47.
8 To the extent where Mr. Kay fails to demonstrate with
9 respect to any of these organizations which you cannot see
10 by looking at the document itself that radios were provided.

11 (The document referred to,
12 having been previously marked
13 for identification as Kay
14 Exhibit No. 47, was received
15 in evidence.)

16 MR. KNOWLES-KELLETT: Okay, Your Honor.

17 JUDGE CHACHKIN: 48?

18 MR. KNOWLES-KELLETT: Your Honor, this is same
19 objection with just a little twist as 14.

20 MR. SCHAUBLE: Your Honor, our objection to this
21 document is this is a list of radios. Two objections. One,
22 I am not sure what the relevance is of just a list of
23 radios, but probably the more fundamental objection is the
24 date of this list as of 6-23-98, which was four years after
25 it was designated for hearing. We are not sure what a list

1 of radios as of June, 1998, proves with respect to the
2 issues in this proceeding.

3 JUDGE CHACHKIN: You can cross-examine Mr. Kay.
4 If you can establish that these radios were purchased
5 recently, then that will be in the record. Those
6 deficiencies will be noted.

7 MR. SCHAUBLE: Your Honor?

8 JUDGE CHACHKIN: We have had all kinds of
9 witnesses testify about how many radios they believed were
10 there, and here we have some kind of a list.

11 MR. KNOWLES-KELLETT: If this list had serial
12 numbers, Your Honor, we could go to the manufacturer. It
13 does not.

14 MR. KELLER: I think some of them do, but not all
15 of them.

16 MR. SHAINIS: Your Honor, I think the point is
17 that the inventory is fungible. In other words, the fact is
18 of this is a constant inventory of quantity that it is
19 probative of what was on hand back then. I think that is
20 what it is being offered for.

21 You know, if a radio functions and you replace it,
22 then you still have the same quantity on hand. I think this
23 is what the testimony will reveal.

24 MR. KELLER: Yes. That is right, Your Honor.
25 There is no dispute that this list was compiled on June 23,

1 1998, in preparation for exchange of exhibits in the prior
2 incarnation of this case.

3 Mr. Kay will be on hand to testify about this list
4 to what extent it does or does not reflect history, and I
5 believe, without holding the man to this, that Mr. French,
6 who is a witness who should appear tomorrow morning, will
7 also be able to give testimony on this.

8 The Bureau's objection, it seems to me, goes to
9 the weight, not the admissibility of the evidence.

10 JUDGE CHACHKIN: 48 will be received.

11 (The document referred to,
12 having been previously marked
13 for identification as Kay
14 Exhibit No. 48, was received
15 in evidence.)

16 JUDGE CHACHKIN: 49?

17 MR. SCHAUBLE: Was this already in evidence? Was
18 this already in evidence through --

19 JUDGE CHACHKIN: Is 49 in evidence?

20 MR. KELLER: I am not sure. I do not think so.

21 MR. SHAINIS: I do not think it is. The letter
22 that Kay's attorney wrote prior to this I think is in
23 evidence.

24 MR. KELLER: It is not in evidence.

25 MR. KNOWLES-KELLETT: We would question the

1 relevance. This relates to an application.

2 JUDGE CHACHKIN: Was this not there with a series
3 of letters?

4 MR. SHAINIS: Yes.

5 JUDGE CHACHKIN: This is another one of those
6 letters?

7 MR. SHAINIS: Your Honor, it goes to Mr. Kay's
8 state of mind, I believe, at the time.

9 MR. SCHAUBLE: Your Honor, for the limited purpose
10 that this was in fact the letter received by Mr. Kay, I do
11 not think we have any objection. I am just going on the
12 same basis as the --

13 JUDGE CHACHKIN: All right.

14 MR. KNOWLES-KELLETT: I will note that even though
15 it relates to -- can I see the letter for just a moment? I
16 want to make sure I am not mis-speaking here.

17 Even though the letter, yes, does go to an
18 application, I will note in the second paragraph of the
19 letter it makes specific reference to the 308(b) letter, so
20 in addition to going to Mr. Kay's state of mind, and that
21 particularly would be the fourth paragraph, it is part and
22 parcel of the 308(b) exchange, shall we call it. It
23 completes the set.

24 MR. KNOWLES-KELLETT: So are you offering it for
25 something other than his state of mind?

1 MR. KELLER: Well, I mean we have all the other
2 letters relating to the back and forth of 308(b), and I
3 think one or two of them in fact go to specific applications
4 rather than to just the 308(b) or enforcement file number
5 itself. I do not see why this one should be missing.

6 MR. SCHAUBLE: We would note, Your Honor, that the
7 applications are not within the scope of this hearing. Just
8 with that note, Your Honor, no objection.

9 JUDGE CHACHKIN: All right. 49 is received.
10 (The document referred to,
11 having been previously marked
12 for identification as Kay
13 Exhibit No. 49, was received
14 in evidence.)

15 MR. SHAINIS: Your Honor, could we have a brief
16 recess before we --

17 JUDGE CHACHKIN: All right.
18 (Whereupon, a short recess was taken.)

19 JUDGE CHACHKIN: No. 50?

20 MR. SCHAUBLE: Objection on the basis of
21 relevance, Your Honor.

22 This is a complaint in a lawsuit filed by Mr. Kay
23 claiming official notice here. This is not probative of
24 anything Mr. Kay may or may not have done, and I do not see
25 the relevance of this to the issues in this proceeding.

1 JUDGE CHACHKIN: How is this relevant, Mr. Keller?

2 MR. KELLER: Your Honor, one of Mr. Kay's defenses
3 with the Section 308(b) issue, and there has been some
4 testimony about it already, concerns his deep concerns about
5 confidentiality and his concerns about what happened to the
6 information, the highly sensitive information he was being
7 asked to provide. This document is directly relevant to his
8 state of mind in terms of the state of mind he was under at
9 this time frame.

10 You will note that the lawsuit was filed in late
11 1993. For some period of time prior to that, Mr. Kay had
12 been having some problems beyond the usual problems in the
13 mobile industry, which is rather feisty and cut throat
14 competitive to say the least; even more so in L.A. Even
15 beyond that, he was having problems with defamation, various
16 things being used against him by his competitors in the
17 market. It probably got to the point which led to this
18 lawsuit.

19 The lawsuit is against a gentleman who was one of
20 the chief antagonists against Mr. Kay which led up to this
21 proceeding, even though he is not now a witness in the
22 proceeding. It was in this backdrop. Mr. Kay knew these
23 things were going on. The problems were being had with this
24 individual, but now he was being asked to turn over this
25 information.

1 The defendant in this lawsuit is also one of the
2 people to whom the copies of the 308(b) letter were
3 transmitted without Mr. Kay's knowledge. Almost before Mr.
4 Kay actually received the 308(b) letter, it was already
5 being used by this individual against him in the
6 marketplace.

7 In short, it really goes to Mr. Kay's state of
8 mind and heightened concern and the rationale for why he was
9 extremely concerned about the confidentiality of the
10 material to be provided.

11 That is the only purpose for which it is offered.
12 We are not attempting to in any way litigate, relitigate or
13 otherwise address the merits of the issues therein. We are
14 simply offering it to show why Mr. Kay maintained the state
15 of mind he did.

16 JUDGE CHACHKIN: Do you have any objection to
17 state of mind?

18 MR. SCHAUBLE: Your Honor, I do not see where this
19 particular document shows anything with respect to state of
20 mind. I mean, without conceding necessarily that his
21 defense is valid in any way, I do not see how this
22 particular document shows anything with respect to his state
23 of mind. I mean, it is something that can be testified to
24 wholly without reference to this document.

25 MR. KELLER: Well, the document provides

1 corroboration for the testimony I suppose, Your Honor. I
2 mean, Mr. Kay can certainly testify to this.

3 The document simply corroborates that yes, this
4 was going on, and here is the particular time frame during
5 which it was going on. It led to a lawsuit, which I will
6 note is what, some six months prior to the 308(b) was the
7 actual filing of the lawsuit.

8 JUDGE CHACHKIN: All right.

9 MR. SCHAUBLE: Your Honor, one other point, if I
10 may. Your Honor earlier ruled that under Mr. Kay's direct
11 that the record of Mr. Kay's excuses or reasons for not
12 responding to the 308(b) letter to the extent they were not
13 in his responses to the Bureau, you did not consider them
14 relevant to this proceeding.

15 JUDGE CHACHKIN: When did I say that? I do not
16 think I made any statements about state of mind.

17 In any event, the exhibit is rejected on the
18 grounds of relevancy.

19 As far as state of mind, I do not see that this
20 has anything to do with Mr. Kay's state of mind. If Mr. Kay
21 needs to refresh his recollection about the events taking
22 place, he could look at this exhibit or any other document
23 for that purpose.

24 MR. SHAINIS: Very well.

25 JUDGE CHACHKIN: The exhibit is rejected.

1 (The document referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit No. 50, was rejected.)

5 JUDGE CHACHKIN: 51?

6 MR. SCHAUBLE: Your Honor, objection based on lack
7 of a sponsoring witness. This is the Thompson affidavit.

8 JUDGE CHACHKIN: As I said previously --

9 MR. KELLER: This is not being offered for the
10 truth of the matter asserted. It is being offered as we
11 would now change this, Your Honor, to a document to be
12 sponsored by Mr. Kay. Consistent with your earlier ruling,
13 Kay will testify regarding this document.

14 MR. SCHAUBLE: I do not know, Your Honor, how Mr.
15 Kay is competent to testify concerning this document.

16 JUDGE CHACHKIN: Are you saying --

17 MR. SCHAUBLE: He can testify concerning his
18 conversation with Ms. Thompson.

19 JUDGE CHACHKIN: As I said previously, Mr. Kay
20 could testify about his conversation with Ms. Thompson
21 insofar as it reflects a state of mind in responding to the
22 Bureau's requests.

23 It is up to the Bureau then if they claim that no
24 such event happened, no such conversation took place, for
25 them to call as a witness Ms. Thompson. Otherwise it will

1 come in the record not for the truth, but at least what
2 happened, which affected Mr. Kay's state of mind. There is
3 no basis for this declaration at this point.

4 MR. KELLER: That is fine. You can rule on it the
5 same way as No. 51.

6 JUDGE CHACHKIN: It will be rejected.

7 (The document referred to,
8 having been previously marked
9 for identification as Kay
10 Exhibit No. 51, was rejected.)

11 JUDGE CHACHKIN: 52? Any objection?

12 MR. KNOWLES-KELLETT: We do not know who Randy
13 Wayman is, the sponsoring witness.

14 JUDGE CHACHKIN: Mr. Kay is available, so --

15 MR. KELLER: Mr. Wayman is not being offered. You
16 did not interview Mr. Wayman? I know he was on the list
17 that was given to you.

18 MR. KNOWLES-KELLETT: Whether or not --

19 MR. SCHAUBLE: Let me ask you. Do you mean Randy
20 French here?

21 MR. KELLER: Richard Wayman. You are right.
22 There is a mistake here. Yes.

23 Randy French can possibly testify as to this, so
24 let's change Wayman to French. It was Richard Wayman and
25 Randy French, and I think I got the names --

1 JUDGE CHACHKIN: So we do have a sponsoring
2 witness. Any objection?

3 MR. SCHAUBLE: Your Honor, there are a large
4 number of pages of documents here which cover a period of I
5 believe up to seven or eight years. I am not sure the
6 entire time period is relevant, but I am not sure it would
7 be fruitful for me to go through page by page on the
8 exhibit, page by page and point out pages that may or may
9 not be relevant.

10 Again, the Bureau's position is that if Mr. Kay is
11 unable to point to a specific frequency or station which
12 these units operated on that this is not eligible for
13 loading purposes.

14 MR. KELLER: Your Honor, I will make the same
15 statement about that that we did awhile ago when we were
16 discussing Exhibit 40. At any rate, this is being offered
17 as corroborating evidence.

18 Mr. Kay does not maintain, and in fact that is one
19 of the primary points in this case. He does not have the
20 ability to reconstruct things precisely in a historical
21 context. He has, however, pointed out that in addition to
22 the matters that are reflected in our billing records, there
23 was also use of the system for loaners, renters and demos.

24 To the extent that we have documentation on that
25 we are putting it in, again because if we just offer Mr.

1 Kay's testimony I am sure it would be objected to and argued
2 that it is simply self-serving. This is such documentation
3 as we have.

4 I will also point out -- no, I will not because I
5 am not sure, and I do not want to mis-speak.

6 JUDGE CHACHKIN: In any event --

7 MR. SCHAUBLE: Your Honor, given the fact that
8 there has been testimony previously on this matter, to that
9 extent this should probably be in the record.

10 JUDGE CHACHKIN: These are contemporaneous
11 records. To the extent --

12 MR. KNOWLES-KELLETT: Maybe Your Honor would
13 consider as with the charitable stuff. You received them
14 and said you would entertain a motion to strike those which
15 were not tied in.

16 JUDGE CHACHKIN: I told you with respect to any
17 material which is not tied in you could move to strike.

18 MR. KNOWLES-KELLETT: Thank you.

19 JUDGE CHACHKIN: The exhibit is received. 52 is
20 received.

21 (The document referred to,
22 having been previously marked
23 for identification as Kay
24 Exhibit No. 52, was received
25 in evidence.)

1 JUDGE CHACHKIN: 53?

2 MR. SCHAUBLE: Your Honor, one moment. I am
3 changing --

4 JUDGE CHACHKIN: All right.

5 MR. SCHAUBLE: -- notebooks here.

6 Your Honor, I object on the basis of relevance. I
7 note, first of all, the date of this letter is November 1,
8 1994, after the time frame. While this is a letter to the
9 Commission, this just appears to contain a series of legal
10 argumentation. I do not think this is really part of the
11 exchange here.

12 JUDGE CHACHKIN: It was not exchanged with the --

13 MR. SCHAUBLE: No. No. It was part of what we
14 considered to be the 308(b) exchange, Your Honor, which took
15 place in the period from January, 1994, to --

16 MR. KELLER: To December of 1994.

17 MR. SCHAUBLE: -- the end of June, 1994.

18 MR. KELLER: I believe it is part of the exchange.
19 It was still going on. There was still correspondence going
20 back and forth.

21 JUDGE CHACHKIN: The exhibit will be received, not
22 for the truth, but the fact it was part of the
23 correspondence between the Commission and Kay's lawyer prior
24 to the designation of this matter for the hearing.

25 //

1 (The document referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit No. 53, was received
5 in evidence.)

6 JUDGE CHACHKIN: 54?

7 MR. SCHAUBLE: Your Honor, I note that this letter
8 relates to applications not at issue herein.

9 MR. KNOWLES-KELLETT: It is the same issue, Your
10 Honor. This is part of an exchange which is asking about
11 these applications referencing for the same reasons as the
12 Section 308(b) request. In other words, it is tied in. Mr.
13 Hollingsworth made requests which incorporated by reference
14 the 308(b).

15 JUDGE CHACHKIN: My inclination again is to
16 receive all the letters back and forth not for the truth,
17 but a continuing dialogue between Mr. Hollingsworth and Mr.
18 Kay. Exhibit 54 is received.

19 (The document referred to,
20 having been previously marked
21 for identification as Kay
22 Exhibit No. 54, was received
23 in evidence.)

24 JUDGE CHACHKIN: What about 55?

25 MR. KELLER: We are not offering this. We believe

1 a version of this letter is already in the record.

2 JUDGE CHACHKIN: All right. 55 is not offered.

3 56? Is 56 in?

4 MR. SCHAUBLE: I believe a different version. I
5 notice that there is a fax line on here.

6 JUDGE CHACHKIN: Is the letter of May 1, 1994,
7 from Brown in?

8 MR. SCHAUBLE: I believe it is.

9 JUDGE CHACHKIN: March 1, 1994

10 MR. SCHAUBLE: I believe it is. I believe that is
11 one of the two letters we put in not in our main volume, but
12 during our examination of Mr. Kay.

13 MR. KELLER: I believe you are correct. We are
14 not offering this exhibit.

15 JUDGE CHACHKIN: All right. 55 is not offered.
16 56 is not offered.

17 What about 57?

18 MR. KNOWLES-KELLETT: First of all, there is no
19 sponsoring witness here, Your Honor. I am not sure they are
20 offering it.

21 MR. KELLER: We are offering it, Your Honor, and
22 there is a mistake here. I do not know how Charles Wells
23 got here. The sponsoring witness for this letter is James
24 Kay.

25 We are not offering this letter for the truth of

1 the matter asserted. We are offering it again under state
2 of mind. It is a letter that was sent to Mr. Wells, who
3 thereupon called Mr. Kay about it and faxed it to Mr. Kay.
4 Mr. Kay will testify that he received the letter from Mr.
5 Wells contemporaneous therewith and how it affected his
6 state of mind. It is sort of in the --

7 MR. SCHAUBLE: Your Honor, it appears this may
8 relate to the same matter as Exhibit 50.

9 You know, apart from the question of Mr. Kay's
10 state of mind, I do not see where this document is needed to
11 determine Mr. Kay's state of mind to the extent state of
12 mind is relevant.

13 JUDGE CHACHKIN: Yes, but this is a letter which
14 was sent.

15 How did Mr. Kay get a hold of it?

16 MR. KELLER: Mr. Wells transmitted it to Mr. Kay.

17 Perhaps the best thing to do with this, Your
18 Honor, is to withhold ruling on it until Mr. Kay testifies.

19 JUDGE CHACHKIN: All right. Ruling withheld on
20 57.

21 58?

22 MR. SCHAUBLE: We do not think this is relevant,
23 Your Honor. We note that Mr. Hollingsworth and Ms.
24 Wypijewski are listed as sponsoring witnesses of this.

25 MR. KNOWLES-KELLETT: Also, it is not probative of

1 anything. If Mr. Kay wants to testify that he checked the
2 records and Mr. Pick went to Gettysburg, that is fine.

3 MR. SCHAUBLE: There are a bunch of records that
4 are not even official Government. They are what appears to
5 be a --

6 MR. KELLER: Your Honor, we will not offer this
7 exhibit at this time, subject to being allowed to use it, if
8 necessary, to refresh Mr. Kay's recollection. Of course, we
9 could always reintroduce or re-offer it.

10 MR. SHAINIS: We are not offering it.

11 MR. KELLER: We are not offering it at this time.

12 JUDGE CHACHKIN: All right. 58 is not being
13 offered.

14 59?

15 MR. KELLER: Let me consult.

16 (Pause.)

17 MR. KELLER: Your Honor, we will not offer this
18 exhibit at this time.

19 JUDGE CHACHKIN: Okay. 59 not offered.

20 60?

21 MR. KELLER: 60, Your Honor. Well, I will wait
22 and see if there is any objection.

23 JUDGE CHACHKIN: Any objection to 60?

24 MR. KNOWLES-KELLETT: Objection as to relevance.

25 MR. KELLER: 60 goes directly to state of mind.

1 Mr. Kay has testified that one of the concerns he had
2 regarding confidentiality was that if the information was
3 provided absent some very strict confidentiality thing it
4 could be very easily obtained by his competitors through
5 FOIA.

6 Also that his competitors were being on an ex
7 parte basis, and I do not mean to imply that that was
8 unlawful ex parte; I just mean the generic meaning of the
9 term ex parte basis, were being kept apprised about
10 specifically what information was being requested.

11 This document demonstrates and corroborates Mr.
12 Kay's knowledge that his competitors were indeed well
13 familiar with the FOIA process and had indeed used it
14 against Mr. Kay in the past.

15 MR. SCHAUBLE: Your Honor, I do not see where that
16 has anything to do with the issues in this proceeding.

17 JUDGE CHACHKIN: We are dealing with state of
18 mind. Do you object? Does it deal with state of mind?

19 MR. SCHAUBLE: Your Honor, I do not see how this
20 document does deal with state of mind.

21 JUDGE CHACHKIN: That is my belief. How does this
22 specific document deal with state of mind? It does reveal
23 that people can make FOIA requests obviously. Whether they
24 will be granted or not is another thing.

25 MR. KELLER: It also demonstrates that specific

1 persons made FOIA requests relating to Mr. Kay.

2 JUDGE CHACHKIN: Does it indicate whether they
3 were granted or anything or what?

4 MR. KELLER: Without Mr. Kay's testimony I cannot
5 tell you that, but I can tell you that the next document
6 goes to that issue as well, yes.

7 JUDGE CHACHKIN: All right.

8 MR. KNOWLES-KELLETT: Are these FOIA requests to
9 the Forest Service?

10 MR. KELLER: I think it is a mixed bag, but I
11 would have to review the document with my client to make
12 sure.

13 JUDGE CHACHKIN: 60 is rejected.

14 (The document referred to,
15 having been previously marked
16 for identification as Kay
17 Exhibit No. 60, was rejected.)

18 JUDGE CHACHKIN: 61?

19 MR. KELLER: 61 is similar not only here, but here
20 was the request that not only was information requested
21 under FOIA, but information actually obtained under FOIA
22 which should have been held confidential and should not have
23 been released under FOIA.

24 JUDGE CHACHKIN: Relating to Mr. Kay?

25 MR. KELLER: Yes. Relating to his U.S. Forest

1 Service documents, which goes to Mr. Kay's state of mind
2 since he had no assurance that even when under the rubric of
3 FOIA information was supposed to be confidential, it would
4 indeed be so held.

5 JUDGE CHACHKIN: Any objection to state of mind?

6 MR. KNOWLES-KELLETT: Just a minute, Your Honor.
7 We are trying to discern that it does do what counsel says
8 it does.

9 JUDGE CHACHKIN: All right.

10 MR. KELLER: Well, it is a document in support of
11 testimony that will go with that. This will corroborate the
12 testimony.

13 MR. KNOWLES-KELLETT: Your Honor, this does not
14 prove anything.

15 The problem with this is while there was a request
16 and there was a response, there is nobody to establish that
17 this resulted in correspondence that this was granted in
18 total. There is just no way without Mr. Pick or Clara
19 Johnson here that this should come in for anything.

20 MR. KELLER: Your Honor, Mr. Kay will testify
21 regarding these matters. None of these documents -- well,
22 very few documents -- in and of themselves tell the whole
23 story.

24 These documents are usually offered in conjunction
25 with the testimony of the witness. Mr. Kay will testify

1 about a universe of matter here that obviously is broader
2 than this document itself, but the document will corroborate
3 part of that testimony.

4 JUDGE CHACHKIN: Well --

5 MR. KELLER: The testimony will essentially be
6 that the USFS held information that was supposed to be held
7 confidential, that competitors of Mr. Kay were nonetheless
8 able to obtain that information through FOIA, and, I believe
9 the testimony will show, even without Mr. Kay's knowledge.

10 MR. SCHAUBLE: Your Honor, I do not see how that
11 can act in any way as a justification or defense for Mr. Kay
12 refusing to respond to a lawful inquiry from the Commission.

13 JUDGE CHACHKIN: We are not going to reach any
14 conclusion at this point.

15 MR. KNOWLES-KELLETT: More directly though, Your
16 Honor, this document does not show any of that. This
17 document shows that somebody who is not a witness here made
18 a FOIA request.

19 MR. KELLER: The witness will testify about this.
20 This document corroborates some of that story. Once again,
21 I can offer the bare testimony of the witness, but then I am
22 subject to you saying he is making it up, or it is
23 self-serving.

24 JUDGE CHACHKIN: It will be in the record. If
25 they do not in cross-examination go into the matter and

1 establish that it should not be believed, then that will be
2 the record. It is up to them.

3 In other words, if he states this affected my
4 state of mind, I heard all these things, and they do not
5 question him on that score, that will be the record. That
6 is what I will rely on. The burden then will shift to them
7 to show that this did not happen, and this could not have
8 been a basis for his state of mind.

9 MR. KNOWLES-KELLETT: I disagree, Your Honor. I
10 think our burden is to show that it does not matter as well.

11 MR. KELLER: Well, that is certainly something you
12 can argue.

13 JUDGE CHACHKIN: You could argue that, but we are
14 only talking about the truthfulness of what he said affected
15 his state of mind. That is all we are dealing with now.

16 I am saying if you do not challenge that, then
17 that will be the record. Later on you will not be able to
18 say this is a bunch of nonsense and this never happened if
19 Mr. Kay testifies to it and you do not challenge it.

20 MR. KNOWLES-KELLETT: Without conceding that the
21 testimony is relevant, Your Honor, I agree completely that
22 the testimony is the only thing that ought to come in.

23 JUDGE CHACHKIN: All right. Is it 60?

24 MR. KELLER: 61, Your Honor.

25 JUDGE CHACHKIN: 61. 61 is rejected.

1 (The document referred to,
2 having been previously marked
3 for identification as Kay
4 Exhibit No. 61, was rejected.)

5 JUDGE CHACKIN: As I say, there is no need for
6 corroboration unless there is a challenge made, if there is
7 no challenge made. If there is a challenge, then you could
8 offer this corroboration if you have to. At this point
9 there is no need for it.

10 62, finally?

11 MR. SCHAUBLE: Your Honor, I notice Ms. Wypijewski
12 was the sponsoring witness. I assume that has changed at
13 this point.

14 MR. KELLER: Mr. Kay will be the sponsoring
15 witness for this document to the extent that a sponsoring
16 witness is needed.

17 MR. SHAINIS: The documents tend to speak for
18 themselves, and it goes to Mr. Kay's state of mind.

19 Your Honor, we are not trying to indict the
20 Bureau, which I think is what the Bureau's fear is. We are
21 just trying to state facts.

22 MR. KNOWLES-KELLETT: We are trying to decide if
23 we have any objection at all, Your Honor.

24 MR. SHAINIS: Okay.

25 MR. KNOWLES-KELLETT: May I have just a second?

1 (Pause.)

2 MR. SCHAUBLE: Your Honor, I think consistent with
3 your prior rulings and given how you view state of mind, I
4 think this would be put in for state of mind purposes only.

5 JUDGE CHACHKIN: You have no objection?

6 MR. KNOWLES-KELLETT: No objection.

7 MR. SCHAUBLE: Limited to show not the truth of
8 anything, but Kay's state of mind.

9 JUDGE CHACHKIN: Correct. All right. No
10 objection. Limited to state of mind, the exhibit is
11 received.

12 (The document referred to,
13 having been previously marked
14 for identification as Kay
15 Exhibit No. 62, was received
16 in evidence.)

17 JUDGE CHACHKIN: That is it with respect to all
18 the exhibits. Tomorrow we will start at 9:30 a.m. The
19 first witness is --

20 MR. KELLER: We will meet with you at 8:30 a.m.

21 MR. KNOWLES-KELLETT: The first witness will be
22 Jeffrey Cohen.

23 MR. KELLER: Before we go off the record, can we
24 again address, because at some point it is going to become
25 relevant, possibly in preparation of the witness, the

1 outstanding request I have for a stipulation on the Carla
2 Pfeifer exhibits? I forget the numbers.

3 There are two separate issues. I know you are
4 looking for stamped copies, but I am also seeking a
5 stipulation that the copies that are already in evidence
6 were obtained from her.

7 MR. KNOWLES-KELLETT: We are going to have to get
8 back to you.

9 JUDGE CHACHKIN: Okay.

10 MR. KELLER: Do you still have the specific
11 numbers that I was talking about?

12 MR. SCHAUBLE: Yes.

13 MR. KELLER: Okay.

14 MR. SHAINIS: You wanted a stamped copy. We will
15 get that to you.

16 JUDGE CHACHKIN: Whose material is this here?

17 MR. KNOWLES-KELLETT: That may be part of their
18 exhibits.

19 MR. KELLER: That is part of the witness exhibit,
20 the one that is not bound.

21 JUDGE CHACHKIN: Okay. Thank you.

22 (Whereupon, at 3:37 p.m. the hearing was
23 adjourned, to reconvene at 9:30 a.m. on Thursday,
24 January 14, 1999.)

25 //

REPORTER'S CERTIFICATE

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HEARING DATE: January 13, 1999

LOCATION: Washington, D.C.

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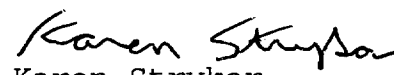
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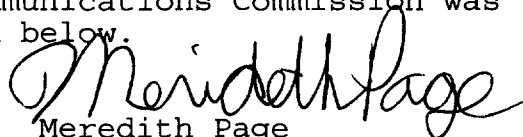
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